Honorable Judge Benjamin Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLYDE RAY SPENCER, Plaintiff, v. DETECTIVE SHARON KRAUSE, and SERGEANT MICHAEL DAVIDSON, Defendants.	No. C11-5424BHS PLAINTIFF'S MOTION TO RECONSIDER CAUSATION INSTRUCTIONS, AND MEMORANDUM OF LAW ON EFFECT OF PROBABLE CAUSE ON REMAINING CAUSES OF ACTION **Noting date: January 21, 2014**

I. REQUESTED RELIEF

Plaintiff files this motion seeking reconsideration of this Court's prior ruling that defendants' proposed "but for" causation instruction should be presented to the jury in this case. That instruction states that plaintiff's due process deliberate fabrication claim is foreclosed if, absent the fabricated evidence, there would be sufficient information to establish probable cause. The existence of probable cause, however, does not defeat a due process deliberate fabrication claim. *Riccuti v. N.Y.C. Transit Authority*, 124 F.3d 123, 130 (2nd Cir. 1997). Plaintiff's "moving force" instruction is the proper proximate causation instruction, as it aligns with the elements of his deliberate fabrication claim as set forth in *Devereaux v. Abbey*.

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In the event that this Court holds that a "but for" instruction is appropriate, the jury should not be instructed that probable cause to arrest defeats Plaintiff's claim, as such an instruction misstates the law and would constitute reversible error.

II. FACTUAL BACKGROUND

The parties filed revised disputed jury instructions on January 13, 2014. Dkt. 246 and 247. The parties disagree as to the proper causation instruction. Plaintiff proposes that causation is established if he "prove[s] by a preponderance of the evidence that the acts and/or failure to act were so closely related to the deprivation of the Plaintiff's rights as to be the moving force that caused the ultimate injury." Dkt. 246-2 at 9 (plaintiff's disputed closing instruction no. 7). Defendants proposed that causation can only be established if plaintiff proves that "without the falsely quoted statements and/or falsely reported information in the police reports, there was insufficient information to establish probable cause necessary to lawfully arrest, prosecute and imprison plaintiff." Dkt. 247-2 at 8 (defendants' disputed closing instruction no. 6, para. 3).

The parties and this Court discussed the parties' disputed causation instruction on the record on January 17, 2014. Defense counsel, relying on *Hervey v. Estes*, 65 F.3d 784 (9th Cir. 1995), asserted that "if you determine there is deliberately fabricated or falsified evidence, what you do is you take out of the equation, and then the proximate cause standard itself becomes, if you take this information out, would there still have been sufficient information upon which to base a determination that probable cause existed." (1.17.14 Transcript, p. 119). Defense counsel continued to argue that if the jury concludes that Shirley's report of the alleged disclosure by Katie Spencer was sufficient to establish probable cause, then defendants are absolved from liability even if they fabricated and conspired to fabricate evidence. (*Id.*, at p. 120). This Court agreed with defense counsel's position that a "but for" proximate cause

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instruction should be submitted, and invited the parties to confer regarding an agreed instruction as to causation. (*Id*. at pp. 119-20).

In addition to a proximate cause instruction, defendants have since proposed that the following disputed "but for" instruction be filed with the Court:

> A cause of an injury is a proximate cause if it is related to the injury in two ways: (1) the cause produced the injury in a direct sequence unbroken by any new, independent cause, and (2) the injury would not have happened in the absence of the cause. There may be more than one proximate cause of an injury.
>
> For plaintiff to prove one or both defendants proximately caused an injury to plaintiff, he must prove that, but for falsely quoted or reported information in police reports, probable cause to arrest plaintiff was absent. Probable cause is defined elsewhere in these instructions.

(Defendants' Disputed Instruction No. 7, Modified).

Plaintiff objects to the foregoing instruction, particularly the second paragraph, because case law is clear that probable cause does not defeat Plaintiff's fabrication of evidence claim. Submitting this instruction would be clear error.

III. ARGUMENT

Defense counsel's statement of the law with respect to causation is erroneous, as *Hervey v. Estes* has no applicability to a deliberate fabrication of evidence cause of action. In *Hervey*, the plaintiff asserted a violation of his Fourth Amendment rights as a result of the defendant officer's presentation of false evidence to the magistrate who issued a search warrant. *Hervey v. Estes*, 65 F.3d at 788. The Fourth Amendment, by its own terms, states that no warrant shall issue absent probable cause. U.S. Const. Amend. IV. By the amendment's express terms, an alleged Fourth Amendment violation and absence of probable cause are inextricably

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intertwined. Therefore, in a case premised on an invalid warrant based on false information, the plaintiff must prove that "the remaining information in the affidavit is insufficient to establish probable cause." *Id.* at 789. This is the proper analysis for Fourth Amendment claims because, if probable cause exists, then there is no constitutional violation. *See Beck v. City of Upland*, 527 F.3d 853, 864 (9th Cir. 2008) ("Proving lack of probable cause is usually essential to demonstrating that the plaintiff's Fourth Amendment rights were violated.").

Consequently, probable cause is the touchstone of qualified immunity analysis in the face of an alleged Fourth Amendment violation. *Hervey* makes this clear: "[I]f an officer 'submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, ... he cannot be said to have acted in an objectively reasonable manner,' and the shield of qualified immunity is lost." *Id*. at 788, citing *Branch v. Tunnell*, 937 F.3d 1382, 1387 (9th Cir. 1991).[1]

Plaintiff's deliberate fabrication and conspiracy claims, however, are rooted in the due process clause of the Fourteenth Amendment, not the Fourth Amendment. *Devereaux*, the seminal 9th Circuit case on deliberate fabrication claims, makes this explicit: "[T]here is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." 263 F.3d 1070, 1075 (9th Cir. 2001) (emphasis added). To prove such a claim, plaintiff must prove that defendants continued their investigation of him despite the fact that they knew or should have known he was innocent. *Id*. at 1076. Notably, a lack of probable cause is not an element of a due process fabricated evidence claim. In fact, probable cause is not mentioned anywhere in

[1] Again, in *Branch v. Tunnell* the plaintiff alleged an officer violated his Fourth Amendment rights by deliberately or recklessly misleading the magistrate to obtain warrants to search his home and office. *Id*. at 1387.

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the *Devereaux* opinion. On the contrary, it is well established that a lack of probable cause is an essential element of a false arrest or false imprisonment claim. *E.g.*, *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992). Thus, the precise constitutional right at issue is of paramount importance in determining whether the presence of probable cause is dispositive.

Defendants' argument seems to suggest that probable cause defeats any § 1983 cause of action based on a law enforcement officer's alleged violation of a constitutional right. Nothing could be further from the truth. For example, a plaintiff asserting a § 1983 due process claim for the unconstitutional nondisclosure of evidence, need only prove that the "nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Smith v. Almada*, 640 F.3d 931, 939 (9th Cir. 2011) (emphasis added). Likewise, the Supreme Court has held that the use of a coerced statement at trial violates the Fourteenth Amendment even if, absent the confession, there is sufficient evidence to convict. *Payne v. State of Ark.*, 356 U.S. 560, 568, 78 S. Ct. 844, 850, 2 L. Ed. 2d 975 (1958). Simply put, probable cause does not defeat causes of action grounded in due process, because a lack of probable cause is not inherent to a due process violation.

The Second Circuit has specifically addressed the argument made by defendants. In *Riccuti v. N.Y.C. Transit Authority*, 124 F.3d 123 (2nd Cir. 1997), the plaintiff asserted causes of action alleging that the defendant officers prepared a false report and initiated the prosecution of the plaintiff based on manufactured evidence. *Id*. at 125. The defendant officers argued that so long as there was probable cause for the arrest, the fabrication of evidence was legally irrelevant. *Id*. at 130. The Second Circuit squarely rejected this claim:

> This argument – an ill-conceived attempt to erect a legal barricade to shield police officials from liability – is built on the most fragile of foundations; it is based on an incorrect analysis of the law and at the same time betrays a grave misunderstanding of those responsibilities which the police must have toward the citizenry in an open and free society. No

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> arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice. Like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable "corruption of the truth-seeking function of the trial process." [citations omitted] (emphasis added).

Id. at 130. In other words, a plaintiff's "fabrication of evidence claim cannot be defeated by the defendant[s'] demonstration of probable cause." *Deskovic v. City of Peekskill*, 894 F. Supp. 2d 443, 452 (S.D.N.Y. 2012), citing *Riccuiti*, 124 F.3d at 129-130.

As a result, defendants' proposed causation instruction, which disposes of plaintiff's due process claim if the jury finds that probable cause existed absent the fabricated evidence, is wholly improper. Because of the danger of confounding a "but for" instruction and probable cause, Plaintiff's proposed "moving force" instruction, which is based on Model Instruction 9.8, should be issued instead. This instruction aligns perfectly with *Devereaux*'s requirement that plaintiff prove his charges were "based on the evidence that was deliberately fabricated" and does not run the risk of juror confusion. In any event, an instruction which informs the jury that Plaintiff must prove the absence of probable cause aside from the deliberately fabricated evidence misstates the law, and for that reason should not be given to the jury.

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IV. CONCLUSION

WHEREFORE, plaintiff respectfully requests that this Court:

(1) Reconsider its prior ruling, and instead order that the jury be instructed pursuant to Model Instruction 9.8,

(2) Deny the defense's request to submit a legally incorrect instruction to the jury that probable cause defeats Plaintiff's deliberate fabrication of evidence and conspiracy claims, and,

(3) Grant any and all other relief deemed appropriate.

RESPECTFULLY SUBMITTED this 20th day of January, 2014.

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DECLARATION OF SERVICE

I hereby certify that on January 20, 2014, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the attorneys of record as follows:

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